

THE INDUSTRY COMMITTEE PROVISIONS OF THE FAIR LABOR STANDARDS ACT

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DURING the past decade, it has become increasingly apparent that wage rates are subject in considerable measure to the control of private, semi-monopolistic organizations of capital and labor.¹ Thus far it has not been proved that any general policy of destroying these combinations can or should be an effective part of a national economic program. Furthermore, even in areas of the economy where wage-fixation by strong combinations is of little significance, the labor market generally exhibits few of the characteristics which the economist attributes to a perfectly competitive market. Consequently, in formulating a national wage policy for the immediate future, it is more useful to compare the relative advantages of different methods of wage fixation by public and private action than it is to contrast experience under a working system of governmental wage regulation with the theoretically predictable results of wage fixation by the forces of perfect competition.

Until recently any attempt to compare the merits of different wage-fixing institutions would have been premature. In 1923 the Supreme Court had restricted the power to fix wages within narrow limits, inhibiting for a decade legislative experimentation with wage fixing devices.² Reconsideration in 1937 of the view that minimum wage legislation *per se* constitutes a deprivation of substantive due process followed resurgence of popular interest in minimum wage legislation.³ Thus assured that the general principle of minimum wage legislation would receive judicial approval, Congress enacted the Fair Labor Standards Act of 1938. It was not, however, until two recent Supreme Court

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1. For an excellent statement viewing the Fair Labor Standards Act as a phase of the development of restraints upon economic freedom, see Fleming, *The Free Enterprise System as a Way of Life*, Wage & Hour Release No. G-44, June 13, 1940 (address).

2. *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

3. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).

decisions, *United States v. Darby Lumber Co.*,⁴ and *Opp Cotton Mills v. Wage and Hour Administrator*,⁵ that the scope of federal power to adopt alternative methods of wage-fixation was clarified. Such judicial clarification makes significant a consideration of the extent to which administrative experience under the Fair Labor Standards Act⁶ indicates the relative merits of different methods of wage-fixation.

LEGAL LIMITATIONS UPON THE ADOPTION OF ALTERNATIVE METHODS OF WAGE-FIXATION

In drafting a statute designed to establish a wage-fixing mechanism the significant problems are the definition of the standards to be employed in fixing wages, the selection of an agency to administer those standards, and the establishment of a procedure for the agency to follow in applying the standards. Standards may be prescribed in the form of a rigid statutory wage scale; or, at the opposite extreme, wage-fixing authority may be delegated to the uncontrolled discretion of an administrative agency. The wage-fixing agency may be either Congress, a professional administrator, or private interested persons. Procedures followed by the agency may be the informal techniques of investigation, synthesis, and decision characteristic of the legislative process or the adversary formalities characteristic of the judicial process. It is believed that the *Darby* and *Opp* cases, read in the light of the language and legislative history of the Fair Labor Standards Act, indicate that any of the possible alternatives with respect to standards, agencies, and procedures will be deemed proper as long as they do not, without cause, affect one definable interest differently from another.⁷

Standards to be Invoked in Fixing Wages

Under the Fair Labor Standards Act, provision is made for a graduated scheme under which all employers subject to jurisdiction of the Act are required, at stated intervals, to increase minimum rates from twenty-five to thirty and then to forty cents an hour.⁸ At any time before the statutory rate of forty cents becomes effective, the minimum wage rate for a given industry may be fixed at not over forty cents by

4. 61 Sup. Ct. 451 (U. S. 1941), 35 ILL. L. REV. 840. For discussion of the effect of this case upon the interpretation of the Tenth Amendment see Feller, *The Tenth Amendment Retires* (1941) 27 A. B. A. J. 223. On constitutionality generally, see Comment (1939) 52 HARV. L. REV. 646. See also Comment (1941) 35 ILL. L. REV. 875.

5. 61 Sup. Ct. 524 (U. S. 1941).

6. For a general discussion of the Fair Labor Standards Act, see Symposium (1939) 6 LAW & CONTEMP. PROB. 321. Brief historical treatments of American wage-fixing experiments may be found in THE MINIMUM WAGE (Int. Lab. Office Publications Ser. D, No. 22, 1939) 192-95; ANN. REP. WAGE & HOUR DIV. 1939 (1940) 1-3.

7. See pp. 1155-57, 1175 *infra*.

8. 52 STAT. 1062 (1938), 29 U. S. C. § 206 (Supp. 1939). The flat statutory minimum of forty cents becomes effective June 25, 1945.

a committee for the industry acting with the approval of the Wage and Hour Administrator.⁹

In the *Darby* case the petitioner claimed that the system of statutory flat minima constituted a deprivation of due process of law because it was unsupported by factual investigation. The Supreme Court avoided the issue by remarking generally that "it is no longer open to question that the fixing of a minimum wage is within the legislative power."¹⁰ Thus, under the *Darby* decision, Congress apparently has unlimited power to enact minimum wage schedules.

In the *Opp* case the petitioner contended that the industry committee provisions constituted an improper delegation of power to fix wages pending the effective date of flat minima because the standards for administrative action were too indefinite. The standards in question provide that the wage-fixing power is to be used to permit attainment, as rapidly as is "economically feasible," of a universal minimum wage of forty cents an hour. The minimum wage rate for any "industry" is to be the highest (not in excess of forty cents an hour) which "having due regard to economic and competitive conditions will not substantially curtail employment in the industry." The industry committee for any industry is required, however, to "recommend" to the Wage and Hour Administrator the establishment of such "reasonable classifications" within any industry as are necessary

"for the purpose of fixing for each classification . . . the highest minimum wage rate . . . which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry"

and

"shall recommend for each classification in the industry the highest minimum wage rate which . . . will not substantially curtail employment in such classification."

No classification is to be made by the administrative agency "solely" on a regional or sex basis, but in determining what classifications are to be made and in determining the rates for such classifications, the administrative agency shall "consider" "among other relevant factors" the following: "competitive conditions as affected by transportation, living and production costs"; wages established for work of like character by collective agreements; and the wages paid for work of like character by employers who "voluntarily" maintain fair labor standards.¹¹

9. 52 STAT. 1063, 1064 (1938), 29 U. S. C. §§ 205, 208 (Supp. 1939).

10. 61 Sup. Ct. 451, 462 (U. S. 1941).

11. These are some obvious ambiguities in these clauses: (1) The rate set is to be the highest not in excess of forty cents an hour which "having due regard for competitive conditions" "will not substantially curtail employment." This phraseology may mean either that any rate set shall be one which after inquiry into economic and competitive

In denying that these standards constituted an improper delegation of legislative power, the Supreme Court in the *Opp* case asserted that the basic standard is the provision that the administrative agency is to set the highest wage, not in excess of forty cents an hour, which will not substantially curtail employment. The process of determining whether differentials are needed to accomplish this basic purpose is denominated by the Court as a "fact-finding" process which Congress might properly

conditions is found to result in no substantial curtailment of employment. *Cf.* § 8(c) (to the words "and recommend"). Or it may mean that the wage set must be one which neither causes substantial curtailment of employment nor fails to give due regard to economic and competitive conditions. *Cf.* § 8(c) (from the words "and recommend").

(2) Industry committees are directed to recommend such classifications as are determined to be necessary "for the purpose of fixing for each classification . . . the highest minimum wage rate . . . which (1) will not substantially curtail employment in such classification and (2) *will not give a competitive advantage to any group in the industry.*" (Italics supplied).

The direction seems inconsistent with the later request that there be recommended for each classification in the industry "the highest minimum wage rate which will not substantially curtail employment in such classification." The inconsistency can be resolved only by ignoring the italicized words.

(3) Is a "competitive advantage" given by confirming the existing wage structure, or by fixing a wage which would harm some producers but not others? It must have been contemplated that the legislation would harm particular producers, or it would have been improper to provide as a declared objective of the legislation the attainment of a universal forty cent minimum.

(4) One of two strained statutory interpretations is necessary in order to reconcile the imperative mandate to set the highest minimum rate "without substantially curtailing employment" with the command to establish differentials which will not "substantially curtail employment" in any "classification" of the industry. If it may be assumed that there is substantial curtailment of "employment" whenever there is substantial curtailment of "employment in a classification," it is difficult to see why the statute employs both phraseologies. If, on the other hand, it is assumed that differentials are to be established above and not below the minimum, all statutory language is given some significance. See Comment (1941) 35 ILL. L. REV. 840, 846. But if this interpretation is sound, there is no textual explanation of the failure of Congress to indicate that only differentials above the minimum were to be permissible. This failure is particularly striking since some employers had urged the establishment of differentials above industry minima and others had urged the establishment of rates below industry minima. Legislative history of the Fair Labor Standards Act is helpful in this connection only by pointing out that it was expected that particular rates would be proper even though they caused hardship and unemployment to some persons. SEN. REP. NO. 884, 75th Cong., 1st Sess. (1937) 4; H. R. REP. NO. 1452, 75th Cong., 1st Sess. (1937) 8; 81 CONG. REC. 7805, 7661 (1937); 81 CONG. REC. APPENDIX 1993 (1937); 82 CONG. REC. 1819-20, 1392 1486-89, 1471 (1937); 82 CONG. REC. APPENDIX 303-04 (1937); 83 CONG. REC. 7290 (1938).

(5) Although the administrative agency is directed to "consider" enumerated and other "relevant" factors in determining the need for and size of wage differentials, no test is afforded by which it can be determined what facts are sufficiently relevant to be "considered" and what factors "considered" must be given weight. *Cf.* pp. 1169-75 *infra*.

delegate to an administrative agency. The agency's determinations on questions of fact are to be conclusive if supported by "substantial evidence."¹² But the Court's treatment of the differential-fixing process as one of fact-finding is unrealistic. Actually, control over differentials gives the administrative agency power to settle important questions of policy. This can be clearly demonstrated by examination of the legislative history of the Fair Labor Standards Act.

Since fixation of a minimum wage at any level would be harmful to some employers and beneficial to others, employer interests represented at Congressional hearings were irreconcilably divided upon the question of the desirability of minimum wage legislation. Some employers virtually unaffected by a proposed forty cent minimum¹³ opposed minimum wage legislation *in toto*, perhaps on the theory that legislative enactment of a minimum wage fixing scheme would be followed sooner or later by fixation of wages at higher levels.¹⁴ The possibility of a defeat upon the general issue of the desirability of minimum wage legislation induced low wage employers to demand differentials in their favor;¹⁵ high wage

12. 61 Sup. Ct. 524, 533 (U. S. 1941).

13. No available statistics estimate by industries the number of employees receiving less than 40 cents an hour. Data compiled by states indicates, however, that only a very small percentage of the gainfully employed are affected by a rise in the wage rate to 30 cents an hour. See TWO YEARS OF THE FAIR LABOR STANDARDS ACT (Bur. of Lab. Statistics Ser. No. R-1177, U. S. Dep't Labor 1940) Table 1. For other data with respect to the effective coverage of the Fair Labor Standards Act, see *Second Year of the Fair Labor Standards Act* (1939) 49 MONTHLY LAB. REV. 1439; ANN. REP. WAGE & HOUR DIV. 1939 (1940) 34; ANN. REP. WAGE & HOUR DIV. 1940 (1941) 81. These documents point out the industries in which the wage incidence of the Fair Labor Standards Act is most significant.

14. Cf. *Joint Hearings before Committees on Education and Labor on S. 2475 and H. R. 7200*, 75th Cong., 1st Sess. (1937) 623, 736, 871-72, 988, 1005, 1076. Some employers argued that wage-fixation by administrative action was improper because difficulties in defining industries and industry classifications would result in arbitrary discrimination. *Id.* at 556, 1213; cf. *id.* at 649. This argument is cogent (see p. 1156 *infra*), but may be answered by pointing out that other methods of wage fixation result in even greater inequalities (see pp. 1154-55 *infra*).

15. A number of Southern employers frankly requested a wage differential as a protective tariff in order to permit "development" of Southern industries. *Joint Hearings*, *supra* note 14, at 439-40, 591, 765. This view obtained limited support from Secretary Perkins, who argued in addition, however, that differentials must not be employed in order to give low wage areas a competitive advantage in markets in which they competed with high wage areas. See *id.* at 186. Some employers argued that differentials which would favor the South were necessary in order to prevent undesirable migration to urban centers (*Id.* at 477), to compensate the South for unfair freight differentials (*Id.* at 1072), or to compensate the South for lower living costs. *Id.* at 591. It was also argued that differentials would do no harm unless they were sufficient to induce migration. *Id.* at 129. A Northern manufacturer whose plant was located in a small Pennsylvania town argued for exemptions or differentials in favor of towns of less than 2,500 on the ground that industries located in such communities were unable to attract skilled laborers, and that they were consequently unable to increase their efficiency by mechanizing. *Id.* at 1112.

employers, most labor leaders and Negro pressure groups, on the other hand, opposed differentials.¹⁶ Some representatives of both high and low wage interests indicated the belief that an administrative agency should be given unlimited discretion to deal with the differential problem.¹⁷ Others believed that differentials should be established on the basis of defined criteria.¹⁸ After termination of the joint hearings on July 8, 1937, a bill was reported similar in all important respects to the final version of the Fair Labor Standards Act. Official comment upon the bill revealed acute consciousness of the diversities in purpose which might be served by provisions conferring upon the administrative agency the power to establish differentials.¹⁹ Although the view most commonly

16. *Employers*: Some employers flatly opposed differentials. *Joint Hearings, supra* note 14, at 92, 372. Some employers who urged establishment of a flat minimum did so because they opposed differentials. *Id.* at 556-58, 562, 959. For interests urging establishment of a flat minimum for other reasons, see note 29 *infra*. One employer argued that an individual should be granted a differential only "if he can prove to the satisfaction of the Board, and it makes a finding to that effect, that the differential will not result in a lower labor or other cost per unit of product." *Id.* at 456, 459; *cf. id.* at 467. Another argued that possession of the power to establish differentials would subject the administrative agency to political pressure, and that the power should consequently be withheld. *Id.* at 508, 509. It was also maintained that the differential power should be withheld because it might be used to give one employer an advantage over another in a given market. *Ibid.*

Unions: Some labor leaders flatly opposed differentials based on geography. *Id.* at 272, 427, 428. Other labor leaders asserted that the power to establish differentials might be used with circumspection to recognize existing gradients, some of which were not geographic. *Id.* at 155, 945, 949.

Negro organisations: "The next type of differential adopted in N.R.A. codes was that of the geographic differential. The fallacious reasoning was that it cost less to live in the South. But an examination of N.R.A. codes reveals the blunt fact that this differential was used primarily to deny benefits of minimum wages to negro workers. First of all the dividing line between North and South varied from code to code depending on the geographical location of the industry and the number of negro workers employed in any particular area." *Id.* at 572; see also *id.* at 864-65. One Southern employer said that the South needed favorable wage differentials because of the "Negro problem." *Id.* at 1072-73.

17. *Employers*: *Id.* at 612, 616 (differentials on real wage lines between North and South and between large cities and small towns advocated; also usefulness of the differential as a method of national planning stressed). *Employees*: *Id.* at 220, 266.

18. It was urged that differentials should be permitted, if at all, upon the basis of statistical indices readjusted periodically, (*id.* at 812-13), and that administrative discretion should be limited by a provision that no differentials should be granted which would more than equalize the ratios in low and high wage areas of labor cost to total value of output. *Id.* at 1214-15.

19. Senator Vandenberg pointed out the ambiguity of the provisions conferring the power to establish differentials. He attributed the ambiguity to differences among Administration leaders. 81 CONG. REC. 7724 (1937). Committee reports state the purpose of the differential provisions in question-begging language. See SEN. REP. NO. 884, 75th Cong., 1st Sess. (1937) 7; H. R. REP. NO. 1452, 75th Cong., 1st Sess. (1937) 9. At a

taken in debate was that the provisions with respect to differentials would be used to preserve existing competitive advantages, there was no consensus with respect to the groups which might be deemed to have competitive advantages.²⁰ "Cotton Ed" Smith assumed that the differential provisions would be utilized to remove the competitive advantages of the South.²¹ Another group felt that wage differentials were temporarily advisable to compensate areas which were at an "unfair" competitive advantage notably because of the existing freight rate structure, but that with removal of "unfair" competitive disadvantages, wage differentials might also be removed.²² A variant of this view may have been the position that differentials were to be employed merely to ease the shock of transition in areas in which transition to higher rates would be particularly difficult.²³ Warnings of the conflict in views as to the purposes of the differential provisions were voiced to no avail prior to vote upon the bill which became the Fair Labor Standards Act.²⁴

later time Representative Dies accused the proponents of the measure of dishonesty in maintaining concurrently that Southern industry would not be hurt because of the permissible differentials and that the bill would stop the trend of industrial migration from the North to the South. 82 CONG. REC. 1387 (1937).

20. It was pointed out by Representative Taylor of Tennessee that the bill would not result in removal of the competitive advantages of the South. 81 CONG. REC. 9506 (1937). The opposite complaint was made by Representative Griswold of Indiana who argued that a similar measure would not remove the competitive disadvantages of the North. See 82 CONG. REC. 1397 (1937). See also *id.* at 1404, 1506-07, 1601-21, 1677 (1937). Cf. testimony of Robert H. Jackson, *Joint Hearings, supra* note 14, at 40: "The differential which the Board would embody in an order is not a differential which already exists, but which it recognizes because the Board is required to find the value of the services at the point which is under consideration . . . So that if you have in mind the possibility of differentials being established for purposes of sliding industry from one community to another, that is not what the Board is authorized to do."

21. 81 CONG. REC. 7882 (1937).

22. See speech of Senator Black, *id.* at 7651: ". . . there might be conditions under which, in order to get to a market, one particular business would be required to pay from two to three times as much freight transportation as another. The board, in my judgment, would be compelled to take that into consideration until the matter was adjusted. There might be conditions where general expenses of operation such as the interest rate, . . . would require that that be taken into consideration in order to reach a fair conclusion." See also *id.* at 7654; AUERBACH, LEGISLATIVE HISTORY OF THE INDUSTRY COMMITTEE PROVISIONS OF THE FAIR LABOR STANDARDS ACT (Wage & Hour Div. 1939) 9; remarks of Representative Ramspeck, *Joint Hearings, supra* note 14, at 206.

23. See colloquy between Senator Walsh and Secretary Perkins. *Id.* at 202.

24. The conference committee attempted to allay all fears by stating that "the differences that will exist between the wage rates applicable in each classification must be justified by facts and not geography." 83 CONG. REC. 9256-57 (1937); see also *id.* at 9264. It was still thought, however, that ". . . there is nothing that is absolutely definite as to wages and hours" (*id.* at 9266), and that differentials would be used to penalize efficiency. *Id.* at 9258.

In viewing these obvious contradictions, the Supreme Court, in its decision that the industry committee provisions constituted a proper delegation of legislative power, has implied that it is appropriate to delegate power to choose from among what Congressional expression has explicitly recognized to be conflicting rules of policy. Exercise of administrative discretion will, however, be subject to the check that findings must be supported by "substantial evidence."²⁵ The *Opp* case indicates that the "substantial evidence" rule may not be invoked in all cases in order to reverse determinations supported by evidence of little probative value. For example, the findings that differences in living and miscellaneous costs did not warrant differentials in textile industry wage rates were supported by only the most flimsy evidence. In concluding that the findings on these questions were supported by substantial evidence, the Administrator ruled in effect that the Wage and Hour Division might decide, purely as a matter of policy, that differentials based upon differences in living and miscellaneous production costs were unwarranted.²⁶ This does not mean, however, that the substantial evidence test may not be used to overthrow an administrative determination of policy which is clearly and unreasonably discriminatory.²⁷

Procedure and Composition of Wage-Fixing Agency.

It may also be inferred from the *Opp* decision that Congress has power to confer upon a wage-fixing agency virtually boundless authority to mould its own composition and procedure. Judicial action will check Congressional or administrative discretion only if the composition or procedure of the agency established is inherently unfair.

The breadth of permissible delegation appears most clearly from Mr. Justice Stone's treatment of the vague statutory provisions delimiting the respective functions of Administrator and industry committee in performing the important task of defining industries. Under the statutory scheme the power to define industries must be exercised in the first instance by the Wage and Hour Administrator as a power implied from his duty to appoint industry committees. The power to sub-delegate to industry committees the function of defining industries, on the other hand, may be implied from the Administrator's power to regulate the proce-

25. *Opp Cotton Mills v. Wage & Hour Adm'r*, 61 Sup. Ct. 524 (U. S. 1941).

26. The Administrator's determination that differences in the cost of living did not require differentials was based upon little evidence. See p. 1169 *infra*. Yet such a holding might have been based upon a number of policy considerations: *e.g.*, that differences in cost of living were insignificant (see note 108 *infra*), or that such differences would have been invoked to prejudice negro workers (see note 16 *supra*).

27. At the present time, it is impossible to indicate whether clear proof of any discrimination will constitute a proper basis for judicial reversal, or whether clear proof of discrimination will constitute a basis for judicial reversal only if the discrimination is shown to be wanton and malevolent. The issue is raised sharply in the pending actions to review the Railroad and Wool industry wage orders. See discussion pp. 1154-56 *infra*.

ture of industry committees. Perhaps, however, industry committees may be obliged on their own motion to re-examine industry definitions as an incident to their duty to define classifications within industries. This ambiguity in describing relative functions of Administrator and industry committee is attributable only in part to legislative desire to give the administrative agency power adequate to handle all emergencies. A more plausible explanation is that ambiguous description was necessary if the legislative plan was to survive the division of opinion between New Dealers, like Senator Black, who wished to entrust all effective power to federal administrators²⁸ and employers who sought to attack the legislation obliquely by urging that wage fixation should be confided to the persons interested.²⁹

In the *Textile* case, the Administrator construed the Act as permitting him to amend certain portions of the definition of the industry in accord with the recommendations of the textile industry committee and as allowing him to amend another portion of the definition upon his own motion after the industry committee had convened. Both these procedures were held proper when the case reached the Supreme Court in the *Opp* case. Mr. Justice Stone argued that in the abstract the power to amend is a useful administrative device permitting the industry definition to be in issue throughout the wage order proceeding. Clearly, therefore, "no

28. Under the Black-Connelly bill, all power to fix wage rates was confided to federal administrative officials. See H. R. 7200, 75th Cong., 1st Sess. (1937) §§ 3-5, 14.

29. In spite of the decision in the case of *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935), one employer argued that wage-fixing ought to be confided to the industry itself. *Joint Hearings*, *supra* note 14, at 155. Other employers maintained that the administrative agency should be required to appoint industry committees to act in an advisory capacity. *Id.* at 611. Those who opposed all minimum wage legislation of course favored regulation "by the industry." See note 14 *supra*. Many employers knew that Congress was committed to some kind of minimum wage legislation, and believed that it was therefore better tactics to advocate the method of minimum wage legislation which would have the least practical effect rather than to oppose minimum wage legislation *in toto*. A statutory flat minimum would be the method of wage fixation involving the least practical effect since a statutory minimum without differentials must be fixed at a sufficiently modest level to avoid drastic effect upon employment in any industry. See, e.g., *Joint Hearings*, *supra* note 14, at 437 *et seq.* (One southern employer advocated both a flat minimum and wage legislation which would give the South the equivalent of a protective tariff); see *id.* at 507, 515 (another witness wanted a fixed minimum and wished to confer upon governmental officials the power to reduce annual wages below \$1,200 if they had become \$1,200 or more as a consequence of collective bargaining); see *id.* at 517 (Congress should fix a minimum of about \$12 a week, this being low enough to permit development of the backward portions of the United States); see *id.* at 751-52 (a flat statutory wage is needed because the object of wage legislation should be the removal of "indecent" wages); see *id.* at 761-62, 802 (fixation of a minimum wage by a board opposed; examination by Chairman Black brings out the fact that both the witness and the association he represented opposed minimum wage legislation *in toto*); cf. *id.* at 809, 812-13, 824-25.

purpose or policy of the Act . . . would be served by precluding such amendments so long as the report of the committee is based on the amended definition."³⁰ In the normal case, therefore, it would seem that Congress may delegate to an administrative agency unlimited power to establish wage fixing procedures and to select agents to perform necessary functions.

It would be a mistake to assume, however, that the only check upon administrative action will be the requirement that it shall not be clearly contrary to statutory purpose or policy. Language in the *Opp* case appears to indicate judicial insistence that elemental standards of fairness must not be contravened by Congressional or administrative action. Although Mr. Justice Stone sustained the Administrator's selection of an industry committee as proper, he was careful to indicate by dictum that the selection of an industry committee might be an "abuse of discretion."³¹ The statement is particularly striking because the statute fails to indicate any limitation upon administrative discretion other than the tautological requirement that "due regard" be given to geographical regions in which the industry is carried on.

The evident desire of the Court to preserve a residual check upon the fairness of administrative procedure is also evidenced by its treatment of petitioner's contention that he had been deprived of adequate notice and hearing under the doctrine of *Morgan v. United States*.³² Although the argument was urged on the Court that the proceeding was analogous to legislation, and that, therefore, neither notice nor hearing was necessary, Mr. Justice Stone preferred to sustain the procedures employed on the more narrow ground that they were essentially fair in the light of rate-making precedents.³³ The *Opp* case thus seems to indicate that while legislative abdication from narrow fields of regulation is constitutional, unreasonable discrimination by either Congress or an administrative agency may occasion subsequent judicial intervention.

EXPERIENCE IN ADMINISTRATION OF INDUSTRY COMMITTEE PROVISIONS

The extended sphere of administrative discretion to mould substantive and procedural standards suggests that it is incorrect to attribute benefits or shortcomings of the administrative process of wage-fixation employed under the Fair Labor Standards Act to the legal instrument establishing the industry committee procedure. Rather, responsibility for administrative decisions has depended wholly upon the quality of the administrative personnel, and upon the conditions of political pressure, time, knowledge and financial ability which have limited the scope of action

30. *Opp Cotton Mills v. Wage & Hour Adm'r*, 61 Sup. Ct. 524 (U. S. 1941).

31. *Id.* at 534.

32. 298 U. S. 468 (1936).

33. *Opp. Cotton Mills v. Wage & Hour Adm'r*, 61 Sup. Ct. 524 (U. S. 1941).

of the administrative agency. Experience in administering the industry committee provisions consequently is of great significance not only in determining whether the comparatively unimportant task of raising wages to forty cents an hour has been well done but also as an indication of the feasibility of any flexible system of wage fixation. Experience under the industry committee provisions is particularly valuable because it can be contrasted with the typical consequences of a flat statutory minimum wage which exists concurrently.

Selection and Delimitation of the "Industry."

The first step in the administration of flexible wage standards under the industry committee provisions of the Fair Labor Standards Act is designation of an industry for which a committee is to be appointed. Since the statutory mandate indicates no requirements governing the order in which committees shall be appointed, only considerations of convenience are important in this connection. Appointment of industry committees will be considered only for industries which have no great difficulty in meeting the statutory minimum currently in effect (now thirty cents). But no committee will be appointed unless a fairly large body of wage earners in the industry is earning less than the highest flat minimum (forty cents) provided in the statute.³⁴ The availability of wage data is a major factor considered in determining whether a minimum shall be set in a given industry. Since the enforcement of compliance is a delicate administrative problem of the Wage and Hour Division, wages will generally be fixed first in occupations in which they are demanded by unions or trade associations.³⁵

But how is the "industry" defined? The Wage and Hour Administrator has indicated in a number of cases that the primary test is *competitive interrelationship*³⁶ as determined from data prepared by interested parties, the Bureau of Labor Statistics, and the industry committees.³⁷ The adoption of this criterion is essential if employer support of governmental wage fixation is to be elicited. Application of the test results, however, in difficult problems. It is commonly oversimplification to view two units as either competitive or non-competitive. Selling markets generally overlap; firms competing for labor supply may not be rivals as sellers; raw materials often are embodied in a host of unrelated products; industries may compete with each other because each competes with a third industry. As a consequence, the Administrator may

34. ANN. REP. WAGE & HOUR DIV. 1939 (1940) 74.

35. ATT'Y GEN'S COMM. ON ADMIN. PROC.: THE FAIR LABOR STANDARDS ACT OF 1938 (1939) 13.

36. This test was first enunciated in Report, Textile Industry Committee, Wage & Hour Release No. R-304, May 23, 1939, at 14-15.

37. Textile Industry, Wage & Hour Release No. R-422a, Sept. 29, 1939, at 7.

generally define an industry, its branches, and classifications in a variety of ways which will give reasonable emphasis to competitive factors.

In most cases, therefore, the Administrator may choose either to define an industry broadly to include many groups interconnected by competitive interrelationship (although not necessarily competing as sellers),³⁸ or he may choose to define an industry narrowly to include only producers whose activities are closely related. The alternative selected is in most cases of little importance since the Administrator considers the same factors in defining classifications of a large industry and in defining industries narrowly.³⁹ Different rates are frequently regarded as appropriate for different articles because the articles are sold in different markets.⁴⁰ A variety of other differentiating factors may also be of importance. Goods may embody different raw materials or result from different processes; they may be produced in different plants or seasons, or by different grades of labor. They may be regarded as the products of different classifications or industries solely because statisticians, federal administrators, labor unions, or trade associations have in the past regarded them as the products of distinct occupations.⁴¹

In practice, however, it is not wholly immaterial whether the Administrator defines industries broadly or narrowly. Certain advantages ensue from broad definition of industries. Duplication of fact-gathering by successive committees may be avoided.⁴² Moreover, a committee for a

38. Broad definitions of industries are favored. See ANN. REP. WAGE & HOUR DIV. 1939 (1940) 75. A branch of a large industry may be redefined and treated as a separate industry when the Administrator rejects the wage recommendations for the branch while accepting other wage recommendations made by the committee for the large industry. See circumstances preceding appointment of a committee for the Embroideries Industry. (Apparel Industry, Wage & Hour Release No. G-39, May 17, 1940, at 357). In some cases the Administrator has acceded to the request of an industry committee that its jurisdiction be reduced, (See Knitted Outerwear Industry, Wage & Hour Release No. G-50, June 12, 1940, at 7) or enlarged (See Jewelry Industry, 3 Wage & Hour Rep. 531 (1941)).

39. Classification that fails to rest upon any difference is held arbitrary by the Administrator. Apparel Industry, *supra* note 38, at 357.

40. *Id.* at 7-9.

41. Textile Industry, *supra* note 37, at 12, 14, 15; Woolen Industry, Wage & Hour Release No. G-35, May 15, 1940, at 25-26; Hosiery Industry, Wage & Hour Release No. R-378, August 18, 1939, at 29-32; Hat Industry, Wage & Hour Release No. G-36, May 15, 1940, at 6-7; Knitted Outerwear Industry, *supra* note 38, at 6; Apparel Industry, *supra* note 38, at 24, 44-51, 93-95, 103, 110-11, 113, 124-25, 128, 224. Cf. *id.* at 27-31. "Infants' and children's outerwear" was treated as a single branch in part because the classification was a unit for publicity purposes. *Id.* at 233. That articles are distinguishable in appearance and durability offers some justification for placing them in different branches. See *id.* at 253-54. Historical differences considered include groupings for statistical purposes under N.R.A., by the Bureau of Labor Statistics, and by the Bureau of the Census. ANN. REP. WAGE & HOUR DIV. 1940 (1941) 111.

42. See Apparel Industry, *supra* note 38, at 10.

large industry may consider the broader competitive relationships which might escape an industry committee whose activities were more limited. Broad definition of industries also results in rapid extension of coverage, which, however, is not an unmixed advantage unless based upon adequate factual analysis. On the other hand, the "large industry" method may possibly be disadvantageous because it normally results in recommendation of numerous rates by a single committee. Consequently, adherence to the "large industry" method would result in considerable wasted effort, should it be held that the Administrator cannot reverse in part and affirm in part recommendations made by a single industry committee.⁴³ A practical disadvantage is that industry committees must be of limited size to be workable⁴⁴ and that therefore the composition of a committee for a comprehensive industry can seldom reflect with even a fair degree of accuracy the different groups subject to the jurisdiction of the committee.⁴⁵ Furthermore, if groups have not been given adequate representation, they may not cooperate in enforcing wage orders.⁴⁶ The advantages to be attained by the broad method of definition may, moreover, be secured to a considerable extent by the device of appointing in rapid succession committees for related industries⁴⁷ or by giving committees for different related industries interlocking personnel.⁴⁸

The problems under either method of definition are identical. In the first place, units within which wages are fixed must be designated in such a manner as to avoid unnecessary hardship to particular competitors. Because there is generally no sharp dichotomy between "being in competition" and "not being in competition", delimitation of industries and classifications will generally result in borderline cases of discrimination. This hardship is aggravated in plants containing machinery which can be employed readily either to produce products subject to the jurisdiction of one wage order or to produce products subject to the jurisdiction of another wage order. The Administrator has adopted the view that a plant will be included in the X industry if its machinery

43. The problem arises out of the ambiguity of 52 STAT. 1064 (1936), 29 U. S. C. § 208 (Supp. 1939). See discussion note 57 *infra*.

44. ANN. REP. WAGE & HOUR DIV. 1939 (1940) 77.

45. See note 84 *infra*.

46. The Wage and Hour Division is frequently confronted with demands for narrow industry definitions. See ANN. REP. WAGE & HOUR DIV. 1940 (1941) 111. For the necessity of cooperating with private interests in order to secure adequate compliance, see note 137 *infra*.

47. Note, for example, the rapid successive appointment of committees for the textile, apparel, wool, hosiery, knitted outerwear, knitted underwear, embroidery, and carpet and rug industries; of committees for leather and luggage industries; and of committees for the pulp and paper, and converted paper products industries.

48. *E.g.*, duplication of personnel of apparel, textile, and knit garment committees. 2 WAGE & HOUR REP. 421 (1939).

might be employed to produce products of the *X* industry.⁴⁹ What, however, if the plant is actually producing *Y*? Is the plant also in the *Y* industry? And shall the *X* or *Y* rate be applicable? Adoption of the view that the plant must pay the higher of the two rates will result in placing the plant at a competitive disadvantage. If, on the other hand, the plant may pay the rate appropriate for the article currently being produced, it will be in a position to evade the statutory mandate because of the administrative difficulty of determining the minimum which should have been paid in a past period. Another frequent problem of competitive inequality arises because of the existence of integrated plants which perform operations both in the *X* and in the *Y* industries. It has been argued with some persuasiveness that institution of a wage order in the *X* industry will bring all of the employees of such a plant under the *X* rate, inasmuch as it is impractical for the plant to pay different rates to employees who work side by side in identical or virtually identical occupations.⁵⁰ Two proposed solutions are applicable both to the situation of the plant employing machinery useful in two or more industries and to the problem of the integrated plant: the *Y* industry may be included in the *X* industry⁵¹ or identical wage rates may be promulgated for the *X* and *Y* industries. Frequently, the former of these two alternatives will be unsatisfactory to members of the *Y* industry since as a corollary of inclusion of the *Y* industry in the *X* industry, it may happen that the *Y* industry must be denied majority or even all representation on the industry committee for the *X-Y* industry. If on the other hand, separate industry committees are appointed for the *X* and *Y* industries, it will be pure coincidence if the *X* and *Y* wage rates are identical.

Since industry definition must thus almost inevitably result in arbitrary discrimination, it might be thought that the attempt to define industries should be abandoned. Industry definition is, however, a necessary result of any system of controlling wages. Every negotiation of a collective agreement and every definition of an appropriate bargaining unit necessitate resolution of the problems of industry definition. The practical

49. Textile Industry, *supra* note 37, at 7.

50. Cf. *Minority Report, Paper Industry Committee*, 3 WAGE & HOUR REP. 178-79 (1940). Apparel Industry, *supra* note 39, at 108, 220, 360-66. In reply to this contention, the Wage and Hour Division generally argues that employees may be segregated, and that even employees who are not segregated can feasibly be paid different rates. *Ibid.* In the slightly different situation in which a given employee is employed in the same work week producing articles for which there are different minima, it is now rebuttably presumed that the employee should have been paid the highest applicable rate throughout the week. 3 WAGE & HOUR REP. 335 (1940), overruling 3 WAGE & HOUR REP. 210 (1940). This rule may cause employers to record the different kinds of work performed by an employee within a given week. The more likely effect will be to terminate the practice of using employees in different work in one work week.

51. Textile Industry, *supra* note 37, at 11-12, 15; Hosiery Industry, *supra* note 41, at 11.

issue, then, is not to choose between a system under which industries are defined by the Wage and Hour Division and a system under which there is no delimitation of industries; it is more important to compare the merits of the Wage and Hour Division method of determining the wage-fixing unit with the merits of delimitation by other forces.

In view of the complexities of competitive interrelationship, it is probably improper to anticipate that any method of defining the wage fixing unit can avoid unfair treatment of some employers. If the procedures employed in defining industries are carefully worked out and if the definitions achieved have not resulted in overlapping of the jurisdiction of different wage orders, the process of industry definition probably achieves all that can be expected. Judged from this point of view, industry delimitation by the Wage and Hour Division has been adequately successful. In the first place, the procedure of industry definition has been planned with considerable care. The initial step is preparation of a study of the wage structure of a particular industry. This study is conducted by the Industry Committee Branch and the Research and Economics Branch of the Wage and Hour Division whose staffs consult members of the industry, trade journals and statistical sources and conduct a field investigation. In nearly all cases the Industry Committee Branch and the Research and Economic Branch ultimately agree with each other and with the substantial interests affected. After a tentative definition is approved by the Legal Branch, it is submitted to the Wage and Hour Administrator, who has invariably sustained the findings of his subordinates. The definition of the industry thus suggested is in issue in subsequent proceedings before the industry committee and again at the hearings before the Administrator.⁵² In the only case to date where the definition of the industry has been seriously disputed in the hearing before the Administrator, the industry committee unanimously disapproved the industry definition although it approved the wage recommendation.⁵³ Usually, however, despite individual objections, the definitions originally established by the Administrator have been approved.

As a consequence of the care with which industries have been delimited, there is no reported instance in which industry definition has caused jurisdictional disputes.⁵⁴ The few instances of dissatisfaction with

52. ATT'Y GEN'S COMM., *supra* note 35, at 14-17.

53. The committee which rejected the definition was the wool industry committee. The definition had been accepted by the textile industry committee. See further note 55 *infra*.

54. Avoidance of jurisdictional disputes is in considerable measure the result of adequate factual analysis. A number of procedures that have been employed have also proved useful: (a) The scope of an exception from an industry definition is defined not by the committee for the industry, but by the committee, established subsequently, for the classification excepted. Apparel Industry, *supra* note 38, at 12. This device may be employed only if no substantial amount of time intervenes between establishment of the committee

industry definitions have been a product of the circumstance, already pointed out, that industry delimitation must generally result in placing some competitors at a competitive disadvantage. But it is submitted that if an individual definition or classification can be justified as an effort to advance the public interest, it should be sustained even though it may cause injury to a definable group.⁵⁵ For it is obvious that any

for the industry and establishment of a committee for the classification excepted. Ambiguity in the first wage order must be clarified promptly if jurisdictional difficulties are to be avoided. (b) By virtue of his power to interpret industry definitions, the Administrator may plug a loophole in an industry definition long after the committee for the industry has become inactive. Cf. 3 WAGE & HOUR REP. 489 (1940); General Counsel's Interpretation of the Apparel Minimum Wage Order, Wage & Hour Release No. G-43 (rev.), May 24, 1940.

For examples of the extreme care employed in definition in order to avoid jurisdictional disputes, see Apparel Industry, *supra* note 38, at 25-26, 44-58. Compare jurisdictional difficulties arising from the administration of the National Industrial Recovery Act. See TROWBRIDGE, SOME ASPECTS OF THE WOMEN'S APPAREL INDUSTRY (N.R.A. Div. of Review, Work Materials No. 44, 1936); N.R.A., HISTORY OF THE CODE OF FAIR COMPETITION FOR THE COAT AND SUIT INDUSTRY (1936) Appendix at 168-69; N.R.A., HISTORY OF THE CODE OF FAIR COMPETITION FOR THE BLOUSE AND SUIT INDUSTRY (1936) 39.

55. The definitions of three industries have been deemed objectionable by interests adversely affected by wage orders. The National Association of Wool Manufacturers recently filed a petition contesting the validity of the woolen minimum wage order of 36 cents. 4 WAGE & HOUR REP. 179 (1941). The petitioners pointed out that as a consequence of the definitions of the textile and of the woolen industries, mixed yarns could be produced on the cotton textile system by employees who were paid 32½ cents an hour whereas employees who produced identical fabrics by the woolen system of production were to be paid not less than 36 cents an hour. The woolen industry committee, it was pointed out, had refused to accept those portions of the definition of the industry which had given cotton textile establishments extensive jurisdiction over mixed yarns. See Report, Woolen Industry Committee, Wage and Hour Release No. R-550, January 4, 1940. The petitioners claimed further that the differential had caused considerable curtailment of employment in woolen mills by shifting production of mixed yarns to textile establishments. After the wool manufacturers filed their petition, a newly appointed committee for the textile industry unanimously voted to raise the textile minimum to 37½ cents an hour. 4 WAGE & HOUR REP. 194 (1941). If the recommendations of the new textile committee are approved by the Wage and Hour Administrator, the wool manufacturers' case will become moot. It is possible that particular textile establishments will then be harmed by the differential in favor of the woolen industry. Cf. 4 WAGE & HOUR REP. 127 (1941) (action to set aside Apparel wage); 4 WAGE & HOUR REP. 71 (1941).

An issue analogous to the issue in the *Woolen* case is presented by the petition to review the railroad wage order which has been filed by certain Southern railroad companies. 4 WAGE & HOUR REP. 162 (1941). The petitioning short line companies contend *inter alia* that the Administrator abused his discretion when he appointed a separate industry committee for the railroads. The proper course, it is alleged, would have been to appoint an industry committee for the entire transportation industry. In treating this issue, the Railroad Industry Committee has remarked: "While the Act charges the Committee with the duty of having due regard to competitive conditions in reaching its findings, it is not the duty of this committee to equalize competitive relations between

attempt to define the unit in which wages are fixed, whether it be by public regulation or private action, will result in a degree of arbitrary discrimination against particular interests.

It has been suggested, however, that the process of defining industries might be improved by acquainting industry committees more thoroughly with the results of statistical analysis.⁵⁶ It is also said that the Administrator should be given express power to reject the definition of an industry in a wage order without rejecting the entire order; otherwise, there is strong practical pressure for the Administrator to approve a wage order *in toto*.⁵⁷ But these considerations are in any event minor, and the procedures followed seem justified by the general satisfaction with the determinations made to date.

Selection of Industry Committee Members.

After an industry has been tentatively defined, the Administrator must select employer, employee, and public members of the industry committee. In naming the employee representatives the principal problems have been to give due weight to the strength of different unions and proper representation to non-union labor. Attempt has been made to distribute committee positions among rival unions in proportion to their relative strengths.⁵⁸ Any failure to achieve proportional representation has been of little significance since representatives of different unions have always agreed on the wage determinations which should be adopted. A more serious difficulty arises from the Administrator's ruling that union officials are proper representatives of unorganized labor because they have sworn to maintain the interests of all classes of labor. By failing to secure participation of unorganized labor on industry committees, the Wage and Hour Administrator has established a procedure which is potentially unfair. In the *Opp* case it was frequently contended and never denied that the great bulk of southern textile labor was non-union

railroads and motor and water carriers. The competition of motor and water carriers is only relevant in so far as it reduces the railroads to so desperate a financial condition that the extra cost resulting from the establishment of a thirty-cent minimum wage will result in discharges and abandonments." Report, Railroad Industry Committee, Wage & Hour Release No. G-64, August 14, 1940, at 44-45.

56. ATT'Y GEN'S COMM., *supra* note 35, at 13-17.

57. It is possible that the Administrator has the power to reverse a wage order in part. *Id.* at 18-20. The power to reject wage recommendations for some branches of the industry while accepting wage recommendations for other branches has been exercised at least twice. Puerto Rico Needlework Industry, Wage & Hour Release No. G-105, November 15, 1940, at 9-10; Apparel Industry, *supra* note 39, at 357. But there has been no case in which the Administrator has accepted a wage order while rejecting the industry definition upon which it is based. The Administrator will probably be deemed to lack such power. See *Opp Cotton Mills v. Wage & Hour Adm'r*, 61 Sup. Ct. 524, 534 (U. S. 1941) (wage recommendations must be based on the industry definition adopted).

58. Cf. ATT'Y GEN'S COMM., *supra* note 35, at 23.

and that many southern textile workers earn much more than they would earn in any other employment. Southern labor hence might have a stake in the preservation of a Southern low wage industry. Yet Southern labor was represented on the textile industry committee by union officials most of whose constituents resided in the North, and Northern labor would like nothing better than to protect northern manufacturers and northern wage standards by eliminating the competition of wage cutting southern employers. It is thus potentially harmful to the interests of the unorganized to permit union officials to represent non-union labor. Adoption of this method of representation has been justified by the Administrator on the ground that a non-union laborer represents only himself or his employer.⁵⁹ The Administrator's argument fails to support his conclusion if it is possible to give representation to the interests of unorganized labor without causing employer domination of the representatives of unorganized labor.⁶⁰

In selecting employer representatives, the practice has been to obtain nominations from trade associations.⁶¹ From the nominations thus received, the Administrator attempts to select persons who will represent the more important wage interest, product, and geographical branches of the industry.⁶² This seems to be subject to the same objection as the parallel practice of determining employee representatives by consulting unions. In the present state of industrial organization, however, no other course seems practical.

It is of peculiar importance that public representatives be selected with care since they normally hold the balance of power upon the question of whether or not a given minimum shall be enacted. In selecting public representatives, the Administrator commonly consults the National Consumers' League.⁶³ In the *Hosiery* case, public representatives were selected

59. Textile Industry, *supra* note 37, at 20; Woolen Industry, *supra* note 41, at 6; ATT'Y GEN'S COMM., *supra* note 35, at 25. Bureau of Labor Statistics data has been employed in compiling the relative strength of unions. The Bureau of Labor Statistics data was obtained, however, by consulting union records. The A. F. of L. has claimed that the C.I.O. records are inaccurate, and the C.I.O. has claimed that the A. F. of L. records are inaccurate.

60. See pp. 1178-79 *infra*.

61. ATT'Y GEN'S COMM., *supra* note 35, at 25-26.

62. ANN. REP. WAGE & HOUR DIV. 1939 (1940) 76; Hosiery Industry, *supra* note 41, at 102. In some instances the necessity of defining industries broadly has prevented the Administrator from giving representation to important product interests. See Apparel Industry, *supra* note 38, at 236 (infants' and children's wear unrepresented on committee), 155 (men's and boys' underwear of woven fabric unrepresented on committee). The Administrator defended the exclusions on the ground that "There are common elements in the manufacture and distribution of the apparel products which qualify each employer on the committee to represent all of the industries covered by the committee." *Id.* at 236.

63. ATT'Y GEN'S COMM., *supra* note 35, at 26.

from the joint recommendations of employers and employees.⁶⁴ In order to serve as a public representative on a committee for a given industry, it is desirable but not essential that a person be qualified by prior experience with problems of the industry.⁶⁵ Criteria which have guided the Administrator in naming public representatives are suggested by the occupations of the selectees. A very large number have been either professors at institutions of higher learning,⁶⁶ newspaper and magazine editors,⁶⁷ or agents of large consumers of products of the industry.⁶⁸ A few have been impartial arbiters for the same or related industries.⁶⁹ Nearly all remaining public members are representatives of consumers organizations,⁷⁰ lawyers,⁷¹ social workers,⁷² members of institutions of economic research,⁷³ state governmental officials,⁷⁴ judges,⁷⁵ engineers,⁷⁶ or clergymen.⁷⁷

Complaints in connection with the organization of the industry committees have generally been made on the ground that the committees do not give "due" representation to geographical areas in which industry

64. ANN. REP. WAGE & HOUR DIV. 1940 (1941) 109.

65. Compare *Record, Opp Cotton Mills v. Wage & Hour Adm'r*, 61 Sup. Ct. 524 (U. S. 1941) [hereinafter cited as *Record*] (pointing out that many members of the first Textile Industry Committee had little knowledge of the problems of the industry) with ANN. REP. WAGE & HOUR DIV. 1939 (1940) 76 (asserting that "Every effort is made to secure public members who are not only disinterested in the sense that they have no personal stake in the outcome of the committee's deliberations, but who also are in a position to contribute positively to the work of the committee. The character, background, and experience of a person and his ability to act intelligently on the problems of his committee are among the factors taken into account in the selection of public members").

66. Textiles (1939); Wool; Leather; Pants; Hosiery (1939); Hats; Apparel; Millinery; Shoes; Textiles (1941); Knitted Outerwear; Knitted Underwear; Clay Products; Enameled Utensils; Portable Lamp and Shade; Embroidery; Converted Paper Products; Luggage; Carpet and Rugs; Pulp and Paper; Leather; Seamless Hosiery (1941); Rubber; Drugs; Gray Iron.

67. Textiles (1939); Hosiery; Shoes; Knitted Outerwear; Knitted Underwear; Pants; Textiles (1941); Apparel.

68. Textiles (1939); Wool; Hats; Shoes (representative was a member of Farm Bureau; Farm Bureau represents farmers as purveyors of raw materials as well as farmers as consumers); Knitted Outerwear; Knitted Underwear; Leather; Luggage; Textiles (1941); Millinery; Apparel.

69. Textiles (1939); Hosiery; Jewelry; Carpets and Rugs.

70. Leather; Embroidery.

71. Shoes; Leather; Clay Products.

72. Textiles (1939); Hats; Millinery; Apparel.

73. Hosiery.

74. Knitted Outerwear; Apparel; Jewelry; Leather.

75. Hats; Puerto Rico; Knitted Underwear; Apparel; Pulp and Paper; Millinery.

76. Pulp and Paper; Apparel.

77. Shoes; Gray Iron. Of the first 94 public representatives appointed, 38 were educators, 17 business executives, 8 lawyers, 6 newspaper executives, 4 representatives of industrial organizations, 3 representatives of consumers organizations, 3 social workers, 3 judges, and 2 engineers. ANN. REP. WAGE & HOUR DIV. 1940 (1941) 109.

is carried on. The Administrator has followed the lower court opinion in the *Opp* case in declaring that it is unreasonable to demand that there be exact mathematical representation of all interests.⁷⁸ Exact representation, it is said, is impractical, for this would result in committees of unwieldy size.⁷⁹ Officers of the national trade associations and unions,⁸⁰ moreover, purport to represent "all" areas.⁸¹

But even if mathematical precision is not feasible, the Administrator might nevertheless make explicit the criteria which he employs in determining what is "due" representation for various geographical areas.⁸² The outstanding opinions of the Wage and Hour Administrators, however, do not indicate preference for one or another criterion or for any number of criteria in combination.⁸³ Silence with respect to methods of selection may not be unwise tactically since argument on the issue would generally reveal only that the Administrator could have readily reached different conclusions and since any attempted explanation would probably be offensive to particular interests.⁸⁴ Characteristic difficulties in effecting proper geographical representation are pointed out by the record in the *Textile* industry case. The record indicates that 31 per cent of American textile establishments are located in the South, that the South contributes 51.5 per cent of the production of American textiles by value and that the South employs 55 per cent of American textile workers.⁸⁵ The cotton textile branch was the only branch of the textile industry which in 1939 experienced serious difficulty in meeting a thirty-two and one-half cent minimum. In this branch the position of the South was even more dominant. Employing 73 per cent of the American workers engaged in manufacturing cotton textiles in 59.9 per cent of the whole number of American establishments, the South produced 70

78. *Opp Cotton Mills v. Wage & Hour Adm'r*, 111 F. (2d) 23 (C. C. A. 5th, 1940), *aff'd*, 61 Sup. Ct. 524 (U. S. 1941); *Woolen Industry*, *supra* note 41, at 4.

79. *Id.* at 6.

80. *Hat Industry*, *supra* note 41, at 11.

81. There has appeared no statistical evidence establishing this "fact".

82. Some possible criteria are total population, number of employers, number of employees, amount of industrial production.

83. *Textile Industry*, *supra* note 37, at 18-22.

84. Because of the necessarily restricted size of the first textile committee, the Southwest received five times its proportional representation (calculated upon the basis of percentage of the national production) although it had only one member on the committee. One of the manufacturers included on the hosiery committee lives in the North although his place of business is in the South. The interests of some persons who have served on industry committees are nation-wide. Public representatives may have similar viewpoints no matter what their nominal places of residence. The above are illustrative difficulties in giving "due" regard to geographical regions, even if it can be assumed that some selection from among the criteria outlined in footnote 82 is feasible. ANN. REP. WAGE & HOUR DIV. 1939 (1940) 77.

85. *Id.* at 19.

per cent of the American value of product.⁸⁶ Under these circumstances the South was awarded four of five employer representatives on the textile committee, three of five public representatives, and two of five employee representatives.⁸⁷

This award was not required by the language and legislative history of the Act. Since the South contributed a majority of the production of American textiles by value and since the South employed a majority of American textile workers, the Administrator might well have argued that the South should have been granted a majority of the members of each class of persons on the textile industry committee. The Administrator might have held that it was improper to define the textile industry to include the predominantly Northern and high wage silk and rayon industries as well as the predominantly Southern and lower wage cotton industry if a necessary consequence of defining the textile industry to include cotton, silk, and rayon was the successful gerrymandering of the wage interest most likely to be adversely affected by a wage order. The Administrator might also have decided that industry committee members should have been nominated with explicit reference to the cotton textile production or total textile production of each of the several states, rather than by reference to regions as large as the "North" and the "South." It may be that none of these alternative arguments would induce results preferable to those achieved by the Administrator in the *Textile* industry case. It is suggested, however, that the important problem of securing proper industrial representation should not be solved by *ad hoc*, unreasoned opinions of the kind handed down by the Wage and Hour Administrator.

*Consideration of the Effect of Minima upon Costs,
Prices and Employment*

Although every opinion of the Wage and Hour Administrator pays lip service to all statutory provisions indicating limitations upon the power to fix wages by means of the industry committee procedure, the interpretation which the Wage and Hour Division has placed upon its power to fix wages can only be determined by examining the issues upon which the Division has thought it expedient to gather evidence and by examining the kinds of evidence to which the Division accords weight. Evidence presented before an industry committee, and subsequently presented before the Wage and Hour Administrator is of two types: testimony from personal experience with respect to the need for or the

86. *Id.* at 18.

87. *Id.* at 19. But *cf.* composition of the second textile industry committee, appointed in 1941. The South was given a majority of public and of employer representatives included on this committee. 4 WAGE & HOUR REP. 129-30 (1941). Yet the committee unanimously approved a 37½ cent minimum wage. 4 WAGE & HOUR REP. 194 (1941).

effect of proposed minima, and statistical studies presented either by governmental agencies (including the Bureau of Labor Statistics and the Wage and Hour Division) or by private interests which would be affected by any determination (A. F. of L., C. I. O., trade associations).

These statistical studies, best proof of the general impact of wage changes, are especially important in view of the Administrator's ruling that the Act does not permit consideration of individual instances of hardship.⁸⁸ Moreover, only statistical studies presented by the government are of real importance since data from other sources is too fragmentary to be of significance.

Statistical studies presented by the Wage and Hour Division for the consideration of the industry committees and for the consideration of the Administrator are of three types: (1) those tending to show the effects of particular wage increases on employment; (2) those dealing with the cost of living in different localities; (3) those dealing with freight differentials.

Effect of Wage Increases

Governmental investigation and presentation of data showing the effects of particular wage increases begins with a field study by the Bureau of Labor Statistics of prevailing wage rates in the industry and of the numbers of employees receiving wages at each rate. A large percentage of the employers in most industries voluntarily submit payroll data to the Bureau of Labor Statistics. This data is brought up to date by sample questionnaires. In the *Shoe Industry* case it was said that "the Bureau of Labor Statistics selected firms on the basis of their corporate affiliations, size, geographical location, production, unionization, and the like. Thus, the sample was selected so that every factor was represented in the same proportion as it actually appeared in the total industry."⁸⁹ From the figures thus obtained, the Wage and Hour Division economic section calculates the percentage increases in the total wage bill of the industry attributable to the payment of minimum wages set at different levels. The method of figuring these percentages is "to determine first the percentage of employees who are

88. See pp. 1167-68 *infra*.

89. Payroll samples employed to date have been checked with data secured from employers during subsequent periods and have been found accurate. *Shoe Industry*, Wage & Hour Release No. G-16, March 23, 1940, at 55-56. In some instances there has been total disregard of sampling principles. It was deemed proper to fail to sample certain minor producing areas because wages there were in general high. *Millinery Industry*, Wage & Hour Release No. R-535, Dec. 15, 1939, at 37. In the *Apparel* case no available study "covered items of sportswear other than heavy jackets, but, since these other items were shown to be closely identified with heavy jackets [the Administrator concluded] that together the surveys offer a basis for measuring with reasonable accuracy the wage bill increases which will be caused by a 40 cent minimum in this industry." *Apparel Industry*, *supra* note 39, at 96.

receiving less than the established minimum and the ratio of their wage rate to the average wage rate. The percentage wage increase in the wage rate of this group may then be applied to that proportion of the industry or plant wage bill which is represented by the payrolls received by the group in question."⁹⁰

It is likewise necessary to take into account changes in wages above the minima which would result because employers are required to maintain wage differentials among various classes of employees. The N.R.A. experience was once thought to indicate that the enactment of a minimum wage necessitates upward revision of wages already above the minimum, and that such upward revision increases total wage cost by from eight to fifteen per cent of the increase in total wage cost resulting from the raising of all employees to the prescribed minimum rate.⁹¹ The Wage and Hour Administrator has realized that use of the N.R.A. experience to ascertain the probable effect of a minimum wage rate in stimulating a rise in wages above the minimum involves a number of dubious assumptions. Moreover, a Bureau of Labor Statistics expert has testified before the Administrator that institution of a minimum wage may cause as small a percentage change in that part of the total wage bill attributable to wages which were below the minimum before the wage order as it causes in that part of the total wage bill attributable to wages which were above the minimum before the wage order.⁹² The Administrator has consequently found it necessary to supplement the N. R. A. data by the assertion that since the Fair Labor Standards Act compels no increase in wage rates above the minimum, it is unimportant whether or not satisfactory statistical study can be made of the effect of a minimum wage order upon wages above the minimum.⁹³ This assertion fails to take due cognizance of the argu-

90. See Brief, Respondent, Appendix B, at 11, *Opp Cotton Mills v. Wage & Hour Adm'r*, 61 Sup. Ct. 524 (U. S. 1941) (hereinafter referred to as Appendix B).

91. *Id.* at 13-14.

92. Testimony of Mr. Jacob Perlman, Chief of the Division of Wage and Hour Statistics of the Department of Labor, *In re Recommendation of the Shoe Industry Committee*, Hearings before the Wage & Hour Adm'r (1939) 31; 6 *id.* at 169-71. See also testimony of Mr. Ball, 6 *id.* at 56 *et seq.* But there was other expert testimony *contra*; see testimony of Mr. Fallon, 6 *id.* at 181-83.

93. Textile Industry, *supra* note 37, at 32. It is now pointed out more cautiously that there are many reasons why it is impossible to calculate with complete accuracy the effect of minima upon wages above the minima. Because increases above the minimum may take place over considerable periods of time, their extent may be conditioned by business conditions considerably different from those experienced at the date of issuance of the wage order. The extent of increase above the minimum may vary between localities due to differences in the bargaining strength of labor, and differences in the labor policy of competitors for the available labor supply. No adjustment of wages above the minimum may be necessary if existing differentials are sufficiently wide. The uncertainty of increases above the minimum may be counteracted somewhat by increases in

ment that an employer who wishes to avoid labor disputes with his employees cannot permit fluctuation in the differentials between rates paid various classes of labor in his employ.

Given the total increases in wage bill resulting from various higher minima, the next step in calculating the effect of given minima will be to determine the ratio between labor cost and total cost characteristic of the industry. This material is likewise obtained from Bureau of Labor Statistics figures. No discussion has been found of the methods of cost accounting employed by the Bureau, but the fact that the industry-wide and sectional ratios employed in making computations have not been disputed is testimony to their propriety. It is true that they have on occasion deviated considerably from cost ratios which individual employers have stated to be characteristic of their own businesses.

Estimate of the effect of proposed wage rates upon labor and total costs in the industry as a whole is supplemented by a comparable estimate for each of various classifications within the industry. In the textile industry, there were five classifications for each of which separate statistics were compiled. The classifications selected for special study were the Northern cotton mills, the Northern integrated mills, the Northern fine goods industries, the Southern integrated mills, and the Southern spinning mills. The selection of these particular classifications was not explained by the Wage and Hour Division. Moreover, these classifications could have been justified only on the assumption that substantial unemployment in any group of mills smaller than the entire body of Southern spinning or integrated textile mills was not "substantial curtailment of employment within any classification of the industry" within the meaning of the legislation. Unless this assumption is made, it cannot be said that the Administrator supported by substantial evidence his finding in the *Textile* case that the proposed wage order would not cause substantial curtailment of employment within any classification of the textile industry.⁹⁴ In view of the uncertain meaning of the phrase "substantial curtailment of employment within any classification of the

individual productivity or by the award of learner exemptions and handicapped-worker permits.

"Some indication of the relative amount of increases above the minimum, in comparison with increases to the minimum can perhaps be found in the experience under NRA. From July to August, 1933, during which period the applicable code became effective, average hourly earnings in the underwear industry increased about 43.8 percent; between August, 1933 and August, 1934 there were further increases aggregating 14.5 percent. The latter figure might be regarded as the amount of the increases above the minimum, which would suggest that such increases will amount to only about one-third of the increases in subminimum wages." Knitted Underwear and Commercial Knitting Industry, Wage & Hour Release No. G-24, April 11, 1940, at 13-14.

94. See note 11 *supra*, indicating the lack of clarity of the phrase "substantial curtailment of employment." For administrative interpretation of the clause "substantial curtailment of employment," see note 125 *infra*.

industry," the Administrator should at least have indicated reasons for adopting the position⁹⁵ that the wage order was a proper exercise of administrative discretion, although not based on a statistical survey of the potential effects of wage increases upon any determinate group of mills more limited than the entire body of Southern integrated or spinning mills. It may be argued, however, that the Bureau of Labor Statistics' study, when supplemented by evidence that individual "small" Southern mills were efficient and that small mills were frequently owned by large corporations, was sufficiently comprehensive to establish at least a *prima facie* case for denying a favorable classification to any number of mills less than the sum of Southern spinning mills.

But the effect of various proposed minima upon total costs does not afford complete insight into the immediate economic effects of wage rises. The impact of increases in total costs upon prices to consumers must also be considered. As the Wage and Hour Division recognized in the *Textile* case, this effect probably cannot be measured with precision. Increased cost may have little effect upon price and may result primarily in a gradual transfer of production from the less efficient to the more efficient mills in the industry. Two other results may also be possible: (1) an offsetting of the increased labor costs in some mills by manipulation of other cost factors, and (2) an absorption of increased costs out of profits of some concerns in the chain from manufacturer to wholesaler or retailer.

The likelihood of one or another of these results depends upon the extent to which prices to consumers are customarily inflexible,⁹⁶ upon the degree of inelasticity of demand for consumers goods,⁹⁷ and upon the

95. The Administrator did devote some discussion to the problem of small mills in the *Textile* case. This discussion appears, however, only to have been by way of rebuttal. It apparently was not felt that the Committee's finding must be supported by independent evidence of the condition of small mills. Some attempt was made to show that small mills were not a special class because of marketing and purchasing disadvantages, but that, on the contrary, some were very profitable. *Id.* at 66-69. Some effort was devoted to impeachment of Mrs. Mager's report on small mills, compiled for Mississippi employers. But the assertion in Mr. Emil Rieve's testimony that the Industry Committee spent most of its time in discussing and analyzing the small or marginal mills does not seem adequately supported by evidence introduced before the Administrator. Appendix B, *supra* note 90, at 8. Some doubt upon the procedure adopted is suggested by Perlman, *Extent and Causes of Differences in Hourly Earnings* (1940) 35 J. AM. STAT. ASS'N 1, 2-3: ". . . there are cases where no industry structure may be said to exist . . . This kind of an industry often has a relatively small number of establishments, which are scattered widely on a regional basis . . . Under such conditions, the wage structure in a given plant is largely the result of competition from establishments of other industries in the same locality . . ."

96. *E.g.*, Textile Industry, *supra* note 37, at 44, 45; Woollen Industry, *supra* note 41, at 10.

97. *E.g.*, Knitted Outerwear Industry, *supra* note 38, at 26. See also Hat Industry, *supra* note 41, at 25.

possibility of cheapening the quality of consumers goods without affecting their price.⁹⁸ No attempt has been made to measure these factors by comprehensive statistical study, as it has been deemed unnecessary or infeasible to do more than record personal experience of the extent to which these factors were important.

Attempt is made, however, to determine statistically the maximum effect which given wage rises will have upon prices to consumers. In the case of a product subject to further processing or to sale to a middleman before retail sale, such determination involves calculation of: (1) the percentage that the cost of production of the article bears to the total cost of various consumers goods which it embodies, and (2) whether markups in the course of further conversion of the article have been changed because of change in its manufacturing cost.⁹⁹ The result will be a schedule indicating quantitatively the maximum effect of various minima in producing percentage increases in prices of various consumers goods. The value of this schedule has been limited somewhat by failure to show which consumers goods absorb the largest percentages of the production of the article whose wage-cost has been increased.

In addition to wage, cost and price data, the government also informs the industry committee of existing trends in industrial production and employment.¹⁰⁰ Thereupon the industry committee draws conclusions

98. See, *e.g.*, Report, Textile Industry Committee, *supra* note 36, at 27.

99. Appendix B, *supra* note 90, at 26-42.

100. From the Textile Industry Record:

(a) it appears that there was some pretence of considering data with respect to the effect of the proposed minimum in augmenting unemployment by stimulating disastrous foreign competition at new price levels. The data considered took into account past trends in the consumption of domestic and foreign textile products. As past trends showed that domestic producers were able on previous occasions to survive cost increases, the Administrator inferred without reference to past or present profit margins that domestic producers would be able to survive in the future cost increases resulting from the newly established minimum. Textile Industry, *supra* note 37, at 47-48. It was also argued that as there had been no significant past foreign competition, this same happy state would continue even though domestic costs had increased. *Id.* at 48. The statistics invoked in regard to past trade were thus of little probative force, a fact admitted by Hinrichs of the Bureau of Labor Statistics. (Record 183). The estimate in the *Textile* case that a given minimum would not cause substantial curtailment of employment rests, in so far as it is based on evidence, solely on data with respect to expected increases in total manufacturing cost and selling price.

(b) it also appears that the *Textile* case considered it of persuasive significance that there was no substantial curtailment of employment as a result of the much larger increases in wages essayed under the National Industrial Recovery Act. This testimony was probably irrelevant as increases in man hours worked during 1933 and 1934 were probably not due to code labor provisions. See LYONS *et al.*, THE NATIONAL RECOVERY ADMINISTRATION (1935) 756-75. In recent opinions the Administrator has probably realized the undesirability of use of NRA statistics; at any rate, he no longer invokes them when writing opinions.

(c) it also appears that the *Textile* case refers to profit margins in the textile industry. The Textile Industry Committee reported, somewhat incautiously, that Bureau of

with respect to whether a given minimum will substantially curtail employment or give a competitive advantage in the industry or in any classification thereof. The textile industry committee and the Administrator apparently regarded further types of data as unnecessary to enable it to make findings upon these issues.

There remains much statistical data, not submitted to committees, yet relevant to the question of whether or not a wage change will substantially curtail employment or give a competitive advantage. Since capacity to absorb a given wage increase commonly determines the effect of the wage increase upon employment, general data with respect to profitability must be considered if wage fixation is to rest upon sound statistical foundation. But neither the Wage and Hour Administration nor any employer group subjected to a wage order has ever introduced general evidence with respect to ability to absorb given wage increases.¹⁰¹ An individual producer may frequently object that a given wage increase will put him out of business. This argument is usually met by evidence that other individual producers in the industry can afford the given increase.

In the early cases an additional argument in rebuttal was that the marginal producer should and would avail himself of technological advances. It was not deemed necessary to buttress the argument by evidence that mechanization would be feasible for the plants hardest hit. Clearly, "Congress did not intend that a committee's recommendation should be disapproved because of lack of up-to-date methods in a few peculiarly situated plants. . . . It is also clear that Congress did not intend that a Committee's recommendation should be disapproved because such marginal plants are unable to maintain modern standards of efficiency already

Labor Statistics data on profits in the cotton textile industry between January, 1933 and June, 1936 indicated that the minimum would not effect substantial decreases in industry profits. See *Wages in Cotton-Goods Manufacturing*, Bur. of Labor Statistics Bull. No. 663 (1938) 4; Report, Textile Industry Committee, *supra* note 36, at 18-19. The Administrator was careful to point out, however, that there was no profit data for the years since 1936. There were witnesses to the general profitability of the industry during 1937 (Record 104, 1434), and to the decline of mill margins since that date. Bur. Labor Statistics Bull. No. 663 (1938). It was suggested, however, that mill margins were probably not an accurate measure of profit margins (Record 1898).

(d) it also appears that an effort was made to demonstrate that there was sufficient excess capacity in the industry to "take up such business as might be lost by mills employing 5, 7, 10 or considerably higher proportions of the total employment." (Testimony of Newman Arnold Tolles, Record 461). But as output per man would be higher after absorption, there would be curtailment. Moreover, even local curtailment of employment with eventual absorption might be serious. See also *Apparel Industry*, *supra* note 38, at 69, 70, 75, 144, 282-83.

101. Relevant general data was submitted in the *Puerto Rico Needlework* case. *Puerto Rico Needlework Industry*, *supra* note 57, at 26. For more typical evidence introduced by the government see *Hosiery Industry*, *supra* note 41, at 91.

being utilized by a large number of plants and consequently may not survive the minimum."¹⁰² Employers then countered by pointing out that the statutory mandate to avoid substantial curtailment of employment was not necessarily complied with by a wage order which resulted in only a few business failures. A wage rate which induced mechanization might be improper because it aggravated severely technological unemployment. This objection was met in the *Textile* case by the contention that mechanization was neither caused nor accelerated by the enactment of a minimum wage. Without any attempt to show the relevance of the observation to the case at hand, it was also pointed out that mechanization does not necessarily result in net unemployment.¹⁰³ It was eventually realized, however, that it was not quite consistent to maintain that manufacturers would mechanize to decrease costs and at the same time that increases in the wage bill would not stimulate but only accompany mechanization. Consequently, the opinions in recent cases generally make no mention of the effects of increases in the wage bill upon mechanization.

It may also be suggested that the data considered in determining effects of wage-fixation on costs and prices is of questionable weight because it can be employed only to determine the effect of each minimum wage without reference to the effect of other minima. It was purportedly shown that neither the minimum in the textile industry nor any minimum set by the apparel industry alone had serious effect upon the price of shirts. But the important question—the combined effect upon the price of shirts of the statutory minima, the apparel minima and the textile minimum—was ignored.¹⁰⁴ Proof by private representatives of the combined effects of various minima was generally deemed irrelevant.¹⁰⁵ But if such proof is irrelevant, even the statutory mandate to avoid substantial curtailment of employment "in the industry" may be nullified.¹⁰⁶

102. Hosiery Industry, *supra* note 41, at 66-67.

103. Textile Industry, *supra* note 37, at 37. The report of the textile industry committee indicates that the committee found it "difficult" to discuss the problem of mechanization. Report, Textile Industry Committee, *supra* note 36, at 21. The direct effects of mechanization were studied thoroughly, however, by the railroad industry committee. See Report, Railway Industry Committee, *supra* note 55. Even this report did not take account of the indirect effects of mechanization, for example on employment in the industries producing the mechanized equipment. For a full theoretical analysis of the relationship of mechanization and employment see JEROME, *MECHANIZATION IN INDUSTRY* (1934).

104. The combined effect of statutory minima and of the wage order under consideration was deliberately ignored in Apparel Industry, *supra* note 38, at 135.

105. *Ibid.*; cf. Hosiery Industry, *supra* note 41, at 33, n. 65.

106. Added elements of uncertainty are present when the statistical methods are not employed with care. For instances of failure to sample adequately see Apparel Industry, *supra* note 38, at 96. See also Puerto Rico Needlework Industry, *supra* note 57, at 21-23.

Differentials Based upon Cost of Living

Cost of living data introduced before the industry committee is also inconclusive. In the *Textile Industry* case the study of the Wage and Hour Division was given determinative weight.¹⁰⁷ In making this study the Bureau of Labor Statistics priced identical objects in 32 cities, including five Southern and five Northern cities with populations of from 10,000 to 19,000. The record in the *Opp* case does not indicate that the 32 cities bore any special relation to the textile industry. The failure to sample communities having less than 5,000 population was not explained. Thus, an expert witness of the Wage and Hour Division has testified that the sample was inadequate to show any correlation between the cost of living and the size of cities.¹⁰⁸ Furthermore, there was no satisfactory indication of systematic selection of articles priced in the study. And there was no explanation of the failure to differentiate between the cost of living for single persons and for persons with dependents or of the failure to distinguish between the cost of living for men and the cost of living for women.

The record in the *Opp* case does reveal, however, that identical articles were priced differently in different localities on the supposition that differences in cost of living can be measured only by pricing the cost of a standardized budget in each locality under consideration. The soundness of this method of ascertaining the cost of living was disputed

107. There was evidence that American Federation of Labor and National Industrial Conference Board studies agreed with the Wage and Hour Division studies. Report, Textile Industry Committee, *supra* note 36, at 55.

Methods used in preparing Wage and Hour Division Study: The budget used in preparing a study of the cost of living in 22 cities was a "maintenance budget" (Report, Textile Industry Committee, *supra* note 36, at 52) based on the needs of a husband, wife and two children. The same methods were used in computing the budget that were used in computing the W.P.A. "maintenance" budget. *In re* the Recommendation of the Shoe Industry Committee, Hearings before the Wage & Hour Adm'r (1939) 99 *et seq.* The study of the cost of living in ten other cities, including two cities having a population of between 10,000 and 19,000, was made by pricing a customary budget for a northern wage earner's family and a customary budget for a southern wage earner's family in both North and South, and by determining the average difference between North and South in the cost of both budgets. Allowance was made for the effect of the warmer southern climate on fuel and housing requirements. The effect of climate on total requirements of clothing, food and miscellaneous items (including furniture and furnishings and household equipment) was found negligible. Industry Committee Exhibit No. 7, *In re* the Recommendations of Industry Committee for the Knitted Outerwear Industry, Hearings before the Wage & Hour Adm'r (1940). The data for 23 of the cities was gathered in 1938. The data for the cities having populations of between 10,000 and 19,000 was gathered in 1939. For an excellent discussion of methods employed in cost of living studies see Williams, *Factors to be Considered in Measuring Intercity and Interregional Differences in Living Costs* (1940) 35 J. AM. STAT. ASS'N 471.

108. Record 454: "I do not believe that we have enough information to generalize as to consistent differences in costs of living by the size of city." Cf. Williams, *supra* note 107, at 480-81.

by an expert witness for a group of Southern employers who contended that a cost of living study should be made by gathering statistics with respect to expenditures of low income groups in different localities rather than by pricing identical items in different localities. In affirming the Textile Industry Committee's decision to adopt the Wage and Hour Division's method of ascertaining the cost of living, the Wage and Hour Administrator stated that:

"The test for determining the cost of living in different geographical regions to which the recommendations will apply is the monetary sum required to purchase an equal standard of living including equally desirable food from the standpoint of the consumer. Although regional variations in types of consumers goods may be taken into account, it would not appear to be permissible for the purposes of this act to place one region on a standard which determines adequacy of diet merely by the chemical ingredients of the food."¹⁰⁹

Apparently, it is permissible for the purposes of the Act to place all regions on a standard which appropriate Bureau of Labor Statistics experts regard as "satisfying."

The Wage and Hour Division's study of the cost of living purported to show 4.6 per cent as the difference in living costs between North and South, and disclosed a very slight average difference between cost of living in small and large communities.¹¹⁰ The study showed larger differences in living costs among communities of the same size than between the average for communities of any given size and the average for communities of any other given size; differences in the cost of living in different communities in the same geographical area, whether in the North or in the South, were greater than the difference between the Northern average and the Southern average. The lowest and highest cost cities were both found in the North. The Industry Committee and the Wage and Hour Administrator concluded upon the basis of this data

109. Textile Industry, *supra* note 37, at 81. A more frank statement is perhaps that of Administrator Fleming when he stated that a 3% difference in the cost of living was "hardly great enough to make much of a fuss about," and that a schedule of slightly different rates everywhere is impossible of enforcement. Fleming, Address before New England Shoe & Leather Ass'n, Wage & Hour Release No. G-23, April 17, 1940, at 7.

110. Testimony of Newman Arnold Tolles, Assistant to the Chief Economist, Wage and Hour Division, Record 452. It is urged that even the 4.6% figure may exaggerate the difference between the cost of living in the North and South. It was said in the *Knitted Outerwear* case that: "It is also significant, in view of the fact that expenditures for food and clothing constitute a relatively large proportion of the spending pattern at low income levels, that with respect to these groups of items costs in the South were as high as, or higher than, costs in the North. Inasmuch as the surveys contemplated an annual income averaging about \$1200 or \$1300, whereas the incomes of workers in this Industry average substantially less than \$950 a year, it is probable that actual North-South differentials within this industry are considerably smaller than the differentials estimated as stated above." *Knitted Outerwear Industry*, *supra* note 38, at 36.

that it was impractical to establish regional differentials based on living costs.¹¹¹

The study introduced in the *Textile* case has also formed the basis for all other industry committee determinations that the cost of living does not require the establishment of differentials. A WPA survey of the cost of living in 59 cities has now been brought down to September 15, 1938 and has been introduced as additional evidence at recent wage hearings.¹¹²

There has thus been what amounts to a complete failure of proof of consequential differences in the cost of living. Existing evidence, therefore, does not justify industry committees in establishing differentials based upon differences in the cost of living. But even if the cost of living were investigated elaborately, it does not follow that the Administrator would permit differentials based solely upon differences in real wages. In fact, the Administrator has asserted that Congress did not intend that workers whose living costs are lower should therefore be paid lower wages.¹¹³

Differentials Based upon Transportation Costs

Data upon transportation costs submitted to industry committees and considered by the Wage and Hour Administration is insufficient to afford a complete picture of distribution of the burden of transportation charges. This is amply attested by examination of the record in the *Opp* case. Experts who appeared before the Administrator to contest the validity of the Industry Committee's thirty-two and one-half cents recommendation pointed out that all rail rates for finished cotton goods were higher from specific Southern points to the major New York market than were corresponding rates from New England.¹¹⁴ New Englanders countered by pointing out that some such differences were not the result of discrimination but only of greater distance,¹¹⁵ that some

111. The figure for New York, N. Y., was 22.9% higher than that for Hanover, Pa.; that for Baltimore, Md., was 12.6% higher than that for Sherman, Texas. Report, Textile Industry Committee, *supra* note 36, at 3-4: "The Committee determined that . . . the gross differences in the cost of living seems (*sic*) to us unimportant in view of the fact that the minimum wage we recommend provides, at best, a very low level of living."

112. Knitted Outerwear, *supra* note 38, at 35.

113. Hosiery Industry, *supra* note 41, at 83. ". . . in view of the findings that production costs and transportation costs do not affect competitive conditions between any such regions, I conclude that those assumed differences in living costs could not alone be cause for a classification within the meaning of §8(c) of the Act." Nor does the cost of living set a bottom limit to wages. Cf. Puerto Rico Needlework Industry, *supra* note 57, at 17, n. 24, indicating that a wage less than an amount equal to the cost of living will be set, if it is necessary to prevent substantial curtailment of employment. See also Perlman, *supra* note 95, at 7.

114. Textile Industry, *supra* note 37, at 92-93.

115. Testimony of James P. Harrington, Record 603, 606-7; Testimony of N. L. Hatch, Record 615-24; Testimony of A. H. Ferguson, Record 632-36.

Southern points had more advantageous rates to the New York market than some New England points,¹¹⁶ that Southern points having all rail disadvantages to the New York market have advantages by the use of both rail and water or truck transportation,¹¹⁷ that Southern gray goods makers could sometimes pass the disadvantages of increased transportation costs on to Northern finishers, and, finally, that Southern manufacturers might be on competitive equality or even on a competitive advantage with Northern manufacturers in sales to Midwestern, Southern and Far Western markets.¹¹⁸ The process of "considering" transportation cost approximated farce when numerous witnesses suggested that it was improper to consider the effect of rail rates upon ability to compete unless the administrative agency examined the effect of such rates on raw material costs,¹¹⁹ on the costs of unfinished products, and on the cost of transporting machinery employed in the mills.¹²⁰ It was also pointed out that transportation cost differentials, even if fairly large, are not significant items in the total cost of finished cotton cloth and hence will not have any great effect upon ability to compete in the sale of finished cloth.¹²¹

The industry committee concluded that "If wage rates were to be granted to equalize the transportation costs for all mills to all markets, the task would be fantastic and impossible of achievement.¹²² . . . Such an attempt would create more problems than it would solve leading to new demands for differential treatment."¹²³ In such circumstances the Fair Labor Standards Act apparently requires no differential to be based upon transportation rates.

*Collective Bargaining Agreements, Production Costs,
Labor Standards Voluntarily Maintained*

The statutory injunction to "consider" collective bargaining agreements, production costs, and labor standards voluntarily maintained appears to

116. Record 598-99.

117. Record 606.

118. Textile Industry, *supra* note 37, at 92-93. See generally, Testimony of Mr. James H. McCann, Transportation Mgr. Associated Industries of Massachusetts, Record 650-51.

119. Textile Industry, *supra* note 37, at 89. Certain sections of the South had advantages in the rates on raw materials. Appendix B, *supra* note 90, at 50 *et seq.* Rates on gray goods and on yarn are comparatively unimportant because the Northern mills now produce only a small fraction of yarn and cotton goods for shipment in the gray. *Id.* at 54-55.

120. Testimony of H. D. Arnold, Textile Traffic Ass'n., Record 643.

121. Textile Industry, *supra* note 37, at 98; Appendix B, *supra* note 90, at 43, 49.

122. Report, Textile Industry Committee, *supra* note 36, at 47. It has been said that these conclusions were reached without even considering the Wage and Hour Division's memorandum on freight rates. Minority Report, Textile Industry Committee, Record 170.

123. Report, Textile Industry Committee, *supra* note 36, at 52.

be of even less significance in the course of industry committee deliberations than the statutory command to "consider" "living" and "transportation costs." Cost of living and railroad rate data have at least been presented in statistical form and with official authentication. On the other hand, the Wage and Hour Division has introduced no general evidence of differences in costs of production, or in rates promulgated by collective agreements or conscientious employers. Since the Administrator treats evidence of particular instances of hardship as irrelevant, the statutory mandate to give due regard to these factors will be completely ineffective unless private interests present a statistical picture of the effect of these factors. The record in the *Opp* case suggests reasons why such statistical examination is unlikely.

In the *Opp* case, employees, with the consent of the Administrator, declined to offer in evidence collective agreements on the ground that they were analogous to trade secrets. Employers, on the other hand, refused to accept secondary evidence of trade agreement rates in effect in various areas. As a consequence, private action will result in no presentation of general evidence of trade union rates except in the eventuality that a union wishes, or an industry committee demands, that secondary evidence be introduced. Secondary evidence introduced by an interested party is in any event of little probative value. The only statistical study of miscellaneous production costs considered in the *Textile* case was a study of obsolescence in Southern mills introduced by the Textile Workers' Union. Data with respect to the tax burden, power costs and construction costs was fragmentary. No evidence was introduced on the question of standards maintained by employers voluntarily maintaining fair labor standards since a number indicated that no employer voluntarily announces standards below which he will not permit wages to sink.¹²⁴

Thus, it is abundantly clear that no wage determination is compelled by statistical analysis of the effect of wage increases upon costs, prices, and employment; or by quantitative appraisal of living, transportation, and miscellaneous production costs; or by comprehensive survey of wage rate patterns resulting from collective agreements or from wage standards voluntarily maintained. In view of the inadequacies of proof, the Administrator might choose either of two alternative paths. He might, on the one hand, accept without serious question industry committee determinations on the theory that they are not wholly unreasonable. This is apparently the course adopted when an industry committee promulgates uniform rates. Not only is it feasible for a committee to reach almost any conclusion with respect to the total volume of unemployment which

124. For the Administrator's treatment of this evidence, see *Woolen Industry*, *supra* note 41, at 20; *Pulp & Primary Paper Industry*, Wage & Hour Release No. G-59, July 18, 1940, at 19, 21. *Hosiery Industry*, *supra* note 41, at 86.

may be caused by a uniform wage rate, but, in addition, the Administrator permits the committee to reach a variety of conclusions with respect to that volume of unemployment which should be treated as substantial. A committee may hold that no substantial curtailment results although 10 per cent to 15 per cent of the employees in the industry may be affected or although a wage increase of 25 per cent is contemplated.¹²⁵ It may hold, on the other hand, that substantial curtailment of employment will result if the rate is not set low enough to permit adjustment by even the weakest units in the industry.¹²⁶

The Administrator may, however, test the adequacy of industry committee determinations, not by reference to whether or not they are supported by evidence, but by whether or not they conform to policies which the Administrator regards as harmonious with the purposes of the statute. This method of inquiry has been adopted by the Administrator in testing the soundness of the view that differentials should be awarded. In view of the policy in favor of treating competitors equally, a differential established by an industry committee will not be sustained unless the committee can sustain the difficult burden of showing that the differential

the average cost of seven or eight samples of each of several products. Sampling was probably inadequate since the samples of a given product in several instances varied more in cost than the average cost of the samples of the product varied from the average cost of the samples of any other product investigated.

The method of proof described in the text has been supplemented by an *a priori* judgment that consumers can be educated to pay higher prices without resulting decreases in demand. *E.g., id.*, at 21-22.

125. Meaning of the formula "substantial curtailment of employment":

(a) Percentages of employees affected: If a wage order affects only the employment of "less than a widely scattered 9 percent of the employees" in an industry, there is no substantial curtailment of employment. Millinery Industry, *supra* note 89, at 28. Speaking in reference to the men's neckwear and scarf industry, the Administrator has said: "I conclude, therefore, that not more than 15 percent of the employees in the Industry are working in plants which will be the most severely taxed by the proposed minimum and that, even assuming some curtailment of employment among this group, there will not result any substantial curtailment of employment or dislocation of employment in the Industry as a whole from the application of the proposed minimum to these lower than average wage plants." Apparel Industry, *supra* note 38, at 318.

(b) Extent of wage rise necessary in order to affect employment: Increase of the average wage bill in New Orleans by 26% and of total cost of production by 8% does not constitute ground for believing that "substantial curtailment" of employment will result when New Orleans manufacturers absorbed much greater increases during the N.R.A. period and when they will still have a substantial wage advantage after enactment of the wage order. *Id.* at 37. But whether or not the result would have been different if a group larger than the group of New Orleans manufacturers had had to make similar large adjustments remains a question.

126. This apparently was the approach adopted in the *Railway Industry* case. See Minority Report, Railway Industry Committee, Wage & Hour Release No. G-68, Aug. 23, 1940, at 1-2. The Railway Committee recommendations have now been approved by the Administrator. But see opposition of many railroads to wage order. Wage & Hour Release No. R-1057, Sept. 24, 1940.

is necessary to preserve the employment or competitive position of a group definable by any of the standards used to segregate a group, or an industry branch or classification.¹²⁷ Moreover, the Administrator has ruled that a producer is not subject to a competitive disadvantage justifying a differential in his favor if, after a wage order establishing a uniform minimum wage rate, he will still pay lower rates on the average than his competitors.¹²⁸ Adoption of this view leaves little scope for operation of the statutory clauses permitting establishment of differentials.

COMPARISON OF INDUSTRY COMMITTEE METHOD WITH OTHER WAGE-FIXATION TECHNIQUES

The weaknesses of the methods of administration employed under the industry committee provisions of the Fair Labor Standards Act tend to indicate not that the industry committee technique should be replaced, but only that administrative techniques must be improved. For deficiencies in the administration of the industry committee provisions cannot be cured by change in law, but only, if at all, by closer attention to the tasks of fact-gathering and public persuasion.

The soundness of these conclusions may be tested by comparing the advantages and disadvantages which experience under the Fair Labor

127. In several cases it has been held that the Administrator will not consider unemployment "substantial" unless it is caused within a "determinate" or "definite" group. Apparel Industry, *supra* note 38, at 66-67, 75, 85, 195-96, 318. This criterion will generally prevent the establishment of differentials based upon geographical areas since "from all available evidence, relatively few states constitute homogeneous wage areas." Perlman, *supra* note 95, at 5. When an industry committee establishes different wage rates for groups not established as definably distinct, the classification will be set aside unless supported by evidence. *Cf. id.* at 357. Affirmative evidence must be of the kind discussed in the text accompanying note 41 *supra*. But if there is a reasonable conflict in evidence, the Industry Committee's determinations of appropriate branches and classifications will be permitted to stand. *Cf. Apparel Industry, supra* note 38, at 321.

128. This formulation receives the most explicit support in the opinions of the Administrator in those cases in which the group claiming a differential will have an average hourly differential in its favor even after enactment of the proposed flat minimum.

E.g., in the *Hat* case, the independent front shops argued that they could not compete with the integrated shops unless they were awarded a differential. The Administrator answered this contention by stating: ". . . the proposed 40-cent minimum will not, if adopted, impair the ability of any group of plants to compete; the independent front shops will have a differential in their favor of 14.2 cents in average hourly wages." Hat Industry, *supra* note 41, at 35; see also Apparel Industry, *supra* note 38, at 72, 135. The rule in the *Hat* case would preclude the award of differentials in nearly all cases, inasmuch as minima generally narrow but do not completely remove pre-existing wage differentials.

It is also supported by the statement (attributed to a witness but cited with apparent approval by the Administrator) that "A differential established in small towns because the cost of living in these towns is lower will give plants located there a competitive advantage." Shoe Industry, *supra* note 89, at 45, n.107.

Standards Act discloses as characteristic of the industry committee method of wage fixation with the merits and demerits to be expected from other methods of wage fixation.

If the industry committee technique is compared with wage fixation by a flat statutory minimum, it may be criticized for failure to effectuate rapid universal wage rate coverage. But failure to extend coverage is unobjectionable in so far as it results from reluctance to cover industries which cannot afford to pay higher wages. Generally, moreover, the industry committee technique of wage fixation results in slow extension of coverage because with limited funds it is impossible to attempt thorough concurrent investigation of more than a few wage structures. That such investigation is necessary in order to avoid the imposition of wage rates which either will be ignored or will result in extensive unemployment has been demonstrated: a statutory thirty cent minimum wage, enacted without satisfactory investigation of wage structures, resulted in disruption of the Puerto Rican economy¹²⁹ and in serious dislocation of the American pecan-shelling industry.¹³⁰

On the other hand, if the industry committee method of wage fixation is contrasted not with a rigid system of wage fixation by statutory rule, but with extension of wage coverage by private agreement and coercion, the superiority of the industry committee method is also patent. The chief argument for return to wage regulation by private action points not to the merits of private regulation but to the futility of industry committee action. Wage regulation by industry committees is said to constitute little more than collective bargaining.¹³¹ The federal govern-

129. Two-fifths of the Puerto Rico laborers subject to the Fair Labor Standards Act earned less than 30 cents an hour. TWO YEARS OF THE FAIR LABOR STANDARDS ACT, *op. cit. supra* note 13. For details with respect to average wages in Puerto Rico, see ANN. REP. COMM'R OF LABOR PUERTO RICO, 1937-38 (1938), at 61, 68-71; 1 Puerto Rico Labor News 202-03 (1938). Attempt to enforce the statutory minimum in Puerto Rico resulted in the lockout of persons employed in the tobacco stripping industry. 2 *id.* 122 (1939). It has been asserted that the important needlework industry was completely destroyed by the Spring of 1940. 23 FORTUNE 91, 129 (Feb., 1941). *Contra*: Puerto Rico Needlework Industry, *supra* note 57, at 33-34. Successive governors of Puerto Rico urged that the Fair Labor Standards Act should not apply to the Islands. 3 Puerto Rico Labor News 76 (1940). The Wage and Hour Division recognized that the flat minima enacted by the Fair Labor Standards Act could not be enforced in Puerto Rico. *Ibid.* Congress ultimately exempted Puerto Rico from the Fair Labor Standards Act, and provided a system of special industry committees for Puerto Rico. Pub. Res. 88, c. 432, 76th Cong., 3d Sess. (1940).

130. See 3 LAB. REL. REP. (Sec. 2) 360 (1938); 2 WAGE & HOUR REP. 4 (1939). Even employers admit that in other industries the Fair Labor Standards Act flat minima have had insignificant effect in the continental United States. See, *e.g.*, Report, Dep't of Mfr. Comm., U. S. Chamb. of Comm. (1939); *cf.* Hinrichs, *Effects of the 25-cent Minimum Wage* (1940) 35 J. AM. STAT. ASS'N 13, at 23. By the same token a statutory minimum low enough to result in no serious hardship is of little effect in raising wage rates.

131. ATT'Y GEN'S COMM., *supra* note 35, at 39. It has been observed by all interests that the data presented to industry committees is frequently ignored. See Shishkin, *Wage*

ment, it is argued, is not justified in financing collective bargaining, particularly if awards cannot be adequately enforced. It is true that wage fixation by industry committee action under the Fair Labor Standards Act bears many resemblances to a collective bargaining process. Industry committees are selected in part because of the existence of interests demanding their formation.¹³² Moreover, it is not reasonable to suppose that bargaining will ever be eliminated if wage fixation is conducted by interested persons. Economic data presently introduced before industry committees appointed under the Fair Labor Standards Act is apparently insufficient to compel purely scientific conclusions with respect to the effect of wage increases upon all units of the industry. Moreover, perfection of the tools of statistical analysis cannot eliminate a margin for bargaining arising from the necessity of choosing from among conflicting interpretations of the statutory mandate.

To admit that there are important elements of bargaining in the industry committee process is not to admit, however, that the process is solely one of bargaining. Even under an industry committee procedure which places the Administrator under strong practical pressure to affirm industry committee determinations,¹³³ the Administrator is able to exercise powers of control which are significant to the economy as a whole. Through exercise of the power to determine the order in which industries are covered, he may assert a basic policy of raising first the wages of the lowest paid laborers or of relocating industry in accord with a plan for the development and allocation of national resources. In contrast, a wage rate structure resulting from the vectors of private coercion and agree-

Hour Law Administration from Labor's Viewpoint (1939) 29 AM. LAB. LEGIS. REV. 63 ("There has been a tendency to arrive at wage recommendations blind-folded by drawing lots rather than by careful weighing of all the facts.") Employer members have frequently pointed out that the interval between presentation of economic information to an industry committee and decision by the committee may be so short (12 hours or less) as to warrant the conclusion that the industry committee did not consider the economic data placed before it. See 2 WAGE & HOUR REP. 522-23 (1939); ATT'Y GEN'S COMM., *supra* note 35, at 39-40. In some cases, however, public representatives have reported that full and fair consideration was given to wage orders. *Ibid.*

132. See p. 1151 *supra*.

133. Under the industry committee provisions of the Fair Labor Standards Act, the Administrator can only affirm or reverse industry committee determinations. If he reverses, he must resubmit the issues to an industry committee. Under these circumstances, the Administrator is under strong practical pressure to affirm. If he failed to affirm, he would be accused of unreasonable delay in administration, of incompetence in selecting the personnel of industry committees, of wasting funds provided for Wage and Hour Administration, and of failing to foster that cooperation between private groups and the Wage and Hour Administration which is essential if the Fair Labor Standards Act is to be adequately enforced. It is only in cases in which industry committees distinguished between rates for different work without being able to make any intelligible argument in favor of the distinction that the Administrator has undertaken to reverse wage determinations.

ment hardly effects any planning function. Furthermore, by proper use of the power to define industries, the Administrator can prevent wasteful jurisdictional conflicts. On the other hand, extension of wage coverage by the unplanned methods of private action must inevitably result in jurisdictional controversies. The industry committee method, unlike private regulation, permits the public to have a voice in wage settlements. Finally, when wages are fixed under governmental aegis, Administrator and court may intervene to curb wilfully unfair treatment of groups that would be without remedy, were wage fixation regarded as a domain for private regulation.

But even if the industry committee method of wage fixation amounted to nothing more than a system of collective bargaining, it would still be worth retaining. Admittedly, the inadequacies of statistical data presently employed by the industry committees render inconclusive the statistical information with which they are supplied. Present methods are, however, subject to growth and supplementation. Better factual investigation may result from vigorous coordination of relevant material already gathered by governmental agencies and from better use of the annals of trade associations and unions. Elimination of duplicatory sources of information may be attempted in order to free resources for use in securing data upon questions as yet unexplored. It may be possible to tabulate profit margins in industries before and after they are subjected to wage orders. Statistical study of the effects of wage rises attributable to mechanization and to the speed-up is not inconceivable. Machinery may be developed which permits continuous aggregation of relevant facts, and the modification of wage orders whenever the circumstances upon which they are based become altered.¹³⁴ Even if the information developed proves no more than a slight check upon collective bargaining, it will still constitute a valuable addition to the store of knowledge which must constitute the basis for any valuable program of national planning.

Criticism of the Administration has also cited the unmethodical representation of conflicting groups on industry committees. But a sound system of industrial democracy must rest upon continuous experimentation with methods of industrial representation. Failure to secure adequate representation of unorganized labor by union officials may lead to efforts to effectuate the more complete organization of labor or to representation of the unorganized by impartial state or federal administrators.¹³⁵ Con-

134. It has been suggested that frequent alteration of minima may discommode businessmen who must be in a position to calculate business costs for some time in advance. *Joint Hearings, supra* note 14, at 584-85, 949. It is doubtful, however, that provision for flexible adjustment of wages in accord with fluctuations in the cost of living would seriously disturb cost calculations.

135. In two instances the Wage and Hour Administrator has permitted representation of unorganized labor by persons who are not union officials: (1) When the Wage and Hour Administrator appointed an industry committee for the Puerto Rican Needle-

tinuation of the industry committee technique, even in a minor segment of the economy, seems a promising method of developing the necessary experience with methods of industrial representation.

It can be urged that a system which involved flexible wage fixation by administrative officials unchecked by the action of industry committees would have the same advantages as a system of wage fixation by industry committees. Moreover, it might have the additional advantage of assuring parity in rates fixed for closely related industries. The legislative history of the Fair Labor Standards Act and the history of other wage-fixing experiments, however, indicate the probable political infeasibility of such a method of wage fixation.¹³⁶ And even if the method is feasible, it seems undesirable. The road to stable industrial democracy is in the long run traversed, not by excluding from industrial government persons whose interests are affected, but by educating them to assume governmental responsibility.¹³⁷

work Trade, he appointed an official of the Puerto Rican Labor Department as a representative for unorganized labor. Puerto Rican Needlework, *supra* note 57, at 13. This course was necessary because the amendment to the Fair Labor Standards Act providing for special industry committees for Puerto Rico (Pub. Res. 88, c. 432, 76th Cong., 3d Sess. (1940) as interpreted by Administrator Fleming, 3 Puerto Rico Labor News 76 (1940)) required the Administrator to appoint employee members of the industry committee who resided in Puerto Rico. The statutory command could not have been obeyed by appointing union officials since the needlework employees were completely unorganized. (2) A shop steward for the Stetson Company served as an employee representative on the Hat Industry Committee. Hat Industry, *supra* note 41, at 8.

136. See note 29 *supra*.

137. Even with every effort to secure cooperation of employers serious difficulties have been experienced in enforcing the statute. Investigation has frequently revealed over fifty per cent non-compliance with some wage-orders. 3 *WAGE & HOUR REP.* 369 (1940); 4 *id.* at 81 (1941).